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IN THE SUPREME COURT

of the

UNITED STATES

_____

_____ Term, 1973

No. 73-607

JOHN H. RICHARDSON

Petitioner

v.

STATE OF IDAHO

Respondent

RESPONSE TO PETITION FOR

WRIT OF CERTIORARI

Respondent, State of Idaho, acting through its attorney, James P. Kaufman, respectfully prays that the Petition for Writ of Certiorari to review the judgment and opinion of the Supreme Court of the State of Idaho, filed June 8, 1973, be denied.

REASONS FOR DENYING THE WRIT

Petitioner has stated that the law in the State of Idaho previous to the case at hand was such to allow a person to resist an unlawful arrest. From that premise he bases his argument that the Idaho Supreme Court suddenly expanded the scope of criminal conduct to disallow such previously permitted conduct and apply the law to him ex post facto.

The State of Idaho does not agree with the premise and submits that the law in Idaho prior to the circumstances giving rise to the case did not allow the Petitioner to resist the arrest, lawful or unlawful. The Petitioner cites three Idaho cases and states that they establish a common law rule that one may resist physically an unlawful arrest for the singular reason that the arrest was unlawful. Petitioner at trial requested an instruction to this effect (Petition for Writ of Certiorari, Page 6). The trial court

and the Idaho Supreme Court did not feel the instruction was proper because the law in Idaho at that time did not allow for such action under circumstances as those presented in the case.

The State of Idaho takes note that in all three of the Idaho cases cited by the Petitioner the appellant was not allowed to resist arrest; all three cases were affirmed in favor of the State. The first case is State v. Mox Mox, 28 Idaho 176, 152 P. 802 (1915). In that instance the appellant was convicted of assault with a deadly weapon. He had been placed under arrest by the constable. The morning after the arrest the Appellant attacked and overpowered the constable while he paused at a creek for a drink of water. He took the constable's weapon and made the assault. The appellant objected to one of the instructions given, claiming that it said he was not at liberty to oppose the arrest

regardless of how unlawful it may have been. The court did not agree. It felt the instruction advised the jury that, if the appellant had submitted to the arrest peacefully, later became the aggressor and committed assault, then he was guilty of a crime. The court found nothing improper with instruction and affirmed the case.

On Page 10 of the Petition for Writ of Certiorari, Petitioner quotes from this case and states it to be the common law; one may resist an unlawful arrest. The passage cited by Petitioner refers to the use of self-defense by ones seeking to avoid an illegal arrest when the arresting officer has placed the person in danger of bodily injury. The court assumed when it made the statement quoted from that the arresting officer had committed a trespass and assault on the person in making the illegal arrest. The spirit of the passage was to cover the situation where the person is placed in

physical danger by an officer using unwarranted physical force to make an illegal arrest. It was not meant to interfere with the officer reasonably attempting to do his duty in placing a suspect under arrest even though the officer had been acting under a mistaken belief. The law in the State of Idaho has never been to allow a person who felt he was innocent of the charge to physically resist an arrest, lawful or unlawful, unless the officer was clearly acting beyond his scope of authority, presenting an unwarranted physical danger.

The record in the case at bar establishes that the physical altercation erupted when two officers were arresting the Petitioner for disorderly conduct. In the course of the ensuing fight, one of the police officers was kicked in the mouth and Appellant ripped one officer's pistol from the holster and fired it into the air. The officers finally subdued the Appellant

with the use of mace. Petitioner now claims that under the common law as it existed in Idaho, he was not acting illegally in putting up such a strong resistance, consisting of loud profanity and physical violence, apparently because he felt it was an unlawful arrest. His contention is that his actions became illegal only when the Idaho Supreme Court filed its decision and that new law describing his conduct was applied to him ex post facto.

The Respondent, State of Idaho, does not accept this contention and urges this honorable Court not to accept it either. The law as it emerged from the Mox Mox case, supra, did not establish that a person could resist an unlawful arrest because he felt it to be so. The violence used by a defendant must be used in self-defense only and not resisting the arrest.

The subsequent Idaho cases bear this out. In State v. Wilson, 41 Idaho 616, 243

P. 359 (1925), the deputy sheriff went to the home of the appellant to arrest him on a liquor charge. Appellant was not home at the moment, so the deputy sheriff drove away from the house and returned a few minutes later. When he returned, the deputy sheriff discovered the appellant attempting to back his car out of the driveway. He blocked the end of the driveway with his car and approached the appellant. Appellant would not get out of the car on demand so the deputy sheriff drew his weapon and fired a couple of shots into the car. Appellant secured a pistol from a pocket in the front door of the vehicle and fired back, killing the deputy sheriff. He was subsequently convicted of murder in the second degree. Appellant defended, claiming the deceased was not properly qualified as a deputy sheriff and had no right to make an arrest. But the court found the appellant knew the deceased was acting as an officer and was

attempting to make an arrest. Appellant further defended, claiming the deceased had no right to use deadly force in making the arrest, and he shot in self-defense. The court did not follow that line of reasoning saying that, "If the person to be arrested either flees or forceably resists, the officer may use all necessary means to effect the arrest." Supra, Page 630.

The court went on to explain when the right of self-defense arises:

> "An officer making an arrest has the right to use such force as is necessary to subject the person sought to be arrested to his authority, but the officer may not kill a misdemeanant in arresting him; and if the officer uses unnecessary force the relations between the parties become the same as those between a private individual, and if the person sought to be arrested believes, or has reason to believe, that he is in danger of being killed, or or rereceiving great bodily injury, he may defend himself, repelling force with force to the extent of slaying the officer when necessary to save his own life, or save himself from serious bodily harm." Supra, Page 630.

This passage deals with the right to use self-defense in protecting oneself when the officer is making an arrest with unwarranted, unnecessary force which presents a physical danger to the defendant. It does not establish a right to resist an unlawful arrest or any arrest notwithstanding the fact that the person arrested may feel it to be unlawful or a mistake. The court makes no approval of a common law right to resist an arrest when one feels it to be wrong.

The next Idaho case on point is State v. Autheman, 47 Idaho 328, 274 P. 805 (1929). The deceased had been deputized by the deputy sheriff to assist him in the search for a boy and his abductor, the appellant. The deceased and the deputy sheriff subsequently located the appellant and the boy at a roadside garage where they had stopped for gasoline. The appellant satisfied himself that the deceased and the deputy were

officers of the law and submitted to the arrest. On the way out to the car, the appellant grabbed the deputy's revolver and started shooting. The deceased died as a result of this action taken by the appellant. "The defense was based generally on the grounds that the arrest was illegal; that appellant had a right to resist it and regain his liberty; and that, in an attempt to regain his liberty, he killed the deceased in self-defense." Supra, Page 331. During the course of the trial, the Appellant requested an instruction to the effect that one has a right to initiate a struggle and free himself from the restraint and the illegal arrest. The instruction was refused and the Idaho Supreme Court affirmed the conviction of murder in the second degree. They cited Mox Mox, supra, and said, "The use of force to free oneself from illegal arrest is only justified when such force is necessary." Supra, Page 335.

The facts in all three of these Idaho cases involved violence employed in the resistance of an arrest by a person who afterwards claimed the arrest was illegal. In none of the cases did the court hold the arrest illegal and, therefore, the appellant had the right to resist the arrest. In all of the cases, the court mentioned that in certain circumstances, physical resistance could be used by the defendant in self-defense, but only when necessary for self-defense. Nowhere has the Idaho Supreme Court said one could resist an arrest because it is illegal. They have refused the argument in the Autheman case, supra, that the physical resistance to an illegal arrest is self-defense. The court held under the facts in all three cases that the appellant did not have the right to resist the arrest. Self-defense was not applicable in either case because there were no circumstances that made it necessary.

And the court did not approve of a common law principle of resisting unlawful arrest as the Petitioner now contends.

When the facts in the case at bar are applied to the reasoning of the Idaho cases, it is clear that the circumstances surrounding the altercation Petitioner had with the officer were not of such a nature as to render the resistance legal. The facts show that the officers were acting in accordance with their duties as policemen and that they did not use an unreasonable amount of force which could have given rise to a right of self-defense. The facts show that the Petitioner reacted violently to the policemen's order to leave the woman alone. Plainly, these circumstances did not give rise to a right of self-defense to resist the arrest under the authority of the Idaho law as cited by the Petitioner and existing at that time.

The Idaho Supreme Court has rendered

an opinion explaining at least one proper course of action in circumstances such as these. In Anderson v. Foster, 73 Idaho 340, 252 P.2d 199 (1953), a complaining witness filed a criminal complaint against Mrs. Anderson. A warrant for her arrest was issued to the appellant and another police officer. They were in uniform and were wearing badges. They found Mrs. Anderson in a drive-in cafe. At that time she was not engaged in the commission of or attempting to commit any offense. The appellant did not inform Mrs. Anderson of his intention to arrest her, the reason for the arrest, or his warrant. He simply ordered her into the police car and refused to tell her where he was going to take her. She, then, challenged his authority and refused to comply with the order whereupon he committed assault and battery upon her. Mrs. Anderson was arraigned the following morning on the criminal complaint and

pleaded guilty. She paid the fine and was released. She, then, brought suit for false imprisonment and won a $2,000 damage award. The jury believed Mrs. Anderson's side of the story and found that the appellant had assaulted her and used force in excess of that necessary to effect her arrest and detention. The Supreme Court of Idaho was called upon to consider the cause of action for false arrest and assault and battery. The court held that when an officer making arrest does not inform the person to be arrested of his intention to make the arrest and the reason and the authority for the arrest, except when the person to be arrested is actually engaged in the offense, its attempt or escape, the arrest is unlawful. The court cited the case of State v. Wilson, supra, Sections 19-602 and 19-610, Idaho Code, and said; "The officer making the arrest must not subject the person arrested to any more force or restraint than is nec-

essary for such arrest and detention; and he is guilty of assault and battery if he uses unnecessary and excessive force." Supra, Page 345.

The court further held that Mrs. Anderson's plea of guilty to the offense did not purge the appellant of his unlawful arrest. The procedure followed by Mrs. Anderson was proper and she did have a right to recover from the appellant for assault and battery and the unlawful arrest.

The case establishes that there is a recourse existing for a person to use in the event of an unlawful arrest. This recourse is not to physically resist the arrest, but to take legal recourse after the arrest. This is the action a person is to take when he feels the arrest is unlawful and the circumstances are not such as to give rise to the right of self-defense.

Idaho Code, 19-610 reads: "When the arrest is being made by an officer under

the authority of a warrant, after information of the intention to make the arrest, if the person to be arrested either flees or forceably resists, the officer may use all necessary means to effect the arrest." Although this passage refers to the situation where the officer is acting under warrant, there are other situations applicable; i.e., a warrantless arrest pursuant to Idaho Code, 19-603: "A police officer may make an arrest in obedience to a warrant delivered to him, or may without a warrant arrest a person:

1) for a public offense committed or attempted in his presence.

2) when a person arrested has committed a felony, although not in his presence.

3) when a felony has in fact been committed and he has reasonable cause for believing the person arrested to have committed it.

4) on a charge made, upon reasonable cause, of the commission of a felony by the party

arrested.

5) at night, when there is reasonable cause to believe that he has committed a felony."

These two statutes should be read in conjunction. It is apparent that the legislature intended the arresting officer to have the authority to use necessary and reasonable force to effect the arrest against a resisting person. The law plainly does not grant the person being arrested the right to resist for that would be the direct advocation of violence. That is, the law clearly does not grant a person the right to resist an arrest when he feels it to be unlawful and at the same time grant the officer the authority to reasonably overcome all resistance to the arrest. One of the premises must fail as they cannot exist at the same time. The State submits that the premise relied upon by the Petitioner must fail as, unlike the premise granting authority to the police to overcome resis-

tance, it is unsupportable either in the case law of Idaho or in statutes. The law is not now, nor has it ever existed, to allow a person being arrested to resist the arrest if he felt it to be unlawful. The law did, and does now, give a person the right of self-defense against an arresting officer when he is using such excessive force as to give rise to physical danger and the law allows for legal reparations for an illegal arrest. Under Idaho Code, 18-703, "Every public officer, or person pretending to be a public officer, who, under the presence or color of any process or other legal authority, arrests any person or detains him against his will, or seizes or levies upon any property, or dispossesses any one of any lands or tenements, without regular process or other lawful authority therefore, it guilty of a misdemeanor."

The State of Idaho therefore urges this honorable Court to deny the Petition

because it is based upon a premise which has never been accepted in this state and has never been a part of its common law. The cases cited by the Petitioner and discussed herein all reject the premise relied upon by the Petitioner.

The Idaho Supreme Court did not change existing law and apply it ex post facto to the Petitioner; the present criminal law was not expanded suddenly to entrap the Petitioner, and there was no law enacted by the Court and applied to him ex post facto. They simply clarified the existing law. The Petitioner raised the issue on his appeal to the Idaho Supreme Court; and the Court has decided that issue and Petitioner now claims that they engaged in the business of changing and enlarging the field of criminal law. The Court had to make a decision, one way or the other.

The State recognizes that when a clear circle of criminal conduct is suddenly

expanded by Court decision and applied ex post facto, the argument may have merit. But, in this instance, the argument is not applicable because the facts upon which the argument is based are not correct. The State urges this honorable Court to consider the law in the State of Idaho prior to the Petitioner's appeal to its Supreme Court. If the Petitioner truly believed that his premise was a reality, as stated on Page 13 of his Petition, his belief came from something other than the law.

For reasons herein set forth, the State of Idaho respectfully urges the denial of the Petition for Writ of Certiorari.

DATED This 19th day of December, 1973.

W. ANTHONY PARK
Attorney General

James P. Kaufman

JAMES P. KAUFMAN
Assistant Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY That I mailed a true and correct copy of the foregoing RESPONSE TO PETITION FOR WRIT OF CERTIORARI to Mr. Golden R. Bennett, 215 Fourth Avenue North, Twin Falls, Idaho, 83301, and to Mr. Theodore V. Behm, 1009 Main Street, Buhl, Idaho, 83316, attorneys for Petitioner, by placing in the U. S. Mail, postage prepaid, a true and correct copy thereof on the 19th day of December, 1973.

James P Kaufman

JAMES P. KAUFMAN
Assistant Attorney General